RECENT CASE NOTES

BANKS AND BANKING—ESTABLISHING PREFERRED CLAIMS AGAINST INSOLVENT BANK.—A bank president received drafts for deposit, with knowledge of the insolvency of his institution. These drafts were sent to the drawee for credit, which was later used to pay debts of the insolvent bank. Suit was instituted by the depositor to establish a preferred claim against the assets in the hands of the receiver. Judgment was for the plaintiff. *Held,* on appeal, that preference be denied, on the ground that the credit received for the drafts had been used to pay the debts of the insolvent bank and therefore was not traced into the custody of the rceiver. *Austin v. Lacey,* 2 S. W. (2d) 876 (Tex. Civ. App. 1928).

Preferences in situations similar to the instant case are permitted only when (1) facts giving rise to a fiduciary relationship are shown; (2) the bank's assets are augmented by the property asserted to be the basis for the claim; and (3) the assets are traced into the custody of the receiver. See *Andrew v. State Bank,* 217 N. W. 250, 253 (Iowa, 1928). A showing that the officers who received the funds knew that the bank was hopelessly insolvent meets the first requirement. *Board of Supervisors v. Prince-Edward Lumber Co. Bank,* 138 Va. 333, 121 S. E. 903 (1924); *Andrew v. Marshalltown State Bank,* 216 N. W. 723 (Iowa, 1927); *cf. May v. Bank of Hughesville,* 291 S. W. 170 (Mo. App. 1927). The assets of the bank are clearly augmented when it has received currency or specie. *Andrew v. State Bank of Omaha,* 215 N. W. 728 (Iowa, 1927). And where items drawn on other banks or parties have been reduced to cash or credit. *Webb v. O'Geary,* 145 Va. 356, 133 S. E. 568 (1926); *In re Linn Co. Bank,* 1 S. W. (2d) 206 (Mo. App. 1928). But *cf. Nyssa-Arcadia Drainage Dist. v. First Nat'l Bank,* 3 F. (2d) 648 (D. Or. 1925) (adverse balance when checks cleared with drawee bank). Whether the receipt of a check drawn on the insolvent bank itself constitutes an augmentation has been the subject of conflicting decisions. A number of recent cases hold that it does. *Leach v. Farmers Savings Bank,* 216 N. W. 748 (Iowa, 1927); *Kansas Flour Mills v. New State Bank,* 256 Pac. 43 (Okla. 1926). But *cf. Andrew v. Farmers State Bank,* 212 N. W. 124 (Iowa, 1927). The Federal courts usually hold *contra. Mechanics and Metals Nat'l Bank v. Buchanan,* 12 F. (2d) 891 (C.C.A. 8th, 1926); *Nyssa-Arcadia Drainage Dist. v. First Nat'l Bank, supra.* But *cf. Ellerbe v. Studebaker Corp.,* 21 F. (2d) 993 (C. C. A. 4th, 1927). See (1927) 36 YALE LAW JOURNAL 682, 685. The fund is ordinarily traced to the receiver if the cash in vault received by him was sufficient to meet the claim. *Kansas Flour Mills v. New State Bank, supra.* But *cf. Andrew v. State Bank of Omaha, supra* (preference only for lowest cash balance between receipt and receivership). Tracing is sometimes facilitated by presumptions that shift the burden to the receiver. *City of New Hampton v. Leach,* 201 Iowa 316, 207 N. W. 348 (1926). To impress other assets with the trust, plaintiffs property must be specifically traced therein. *Farmers Bank v. Bailey,* 297 S. W. 938 (Ky. 1927); *Loan & Savings Bank v. Puerifoy,* 139 S. E. 783 (S. C. 1927) (items sent to correspondent for credit paid to receiver); *cf. Rankin v. Banking Corp.,* 77 Mont. 134, 251 Pac. 151 (1926). Proof that it was used to pay debts of the insolvent bank is not enough. That is ordinarily considered proof of dissipation. *U. S. Nat'l Bank v. Stanrod & Co.,* 42 Idaho 711, 248 Pac. 16 (1926); *Leach v. Sanborn State Bank,* 212 N. W. 694 (Iowa, 1927). In a recent case the court granted a preferred claim against the general assets, even

though it was shown that the cash in vault was insufficient, and that the funds had been used to pay the insolvent bank's indebtedness. *Central Nat'l Bank v. First Nat'l Bank*, 216 N. W. 302 (Neb. 1927). That is a radical departure from the usual view, and although the ratio payable to the general creditors on liquidation would otherwise have been increased at the expense of the defrauded plaintiff, the court perhaps went too far in allowing a preferred claim payable out of all the assets, including real estate. It is submitted, however, that the orthodox result reached by the court in the instant case is, if anything, less desirable. The trust idea as a basis for decision in such cases is difficult to apply, provokes much unnecessary litigation, and is largely fortuitous in result. Rules of preference, probably intermediate the strict trust view of the instant case and the view adopted by the Nebraska case, might well be established by legislation.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—FLEXIBLE TARIFF.—By the "flexible provision" of the Tariff Act of 1922 [42 Stat. 941 (1922), U. S. Comp. Stat. (Supp. 1923) § 5841 c. 19], the President, after an investigation and with the advice of the Tariff Commission, was authorized to determine and proclaim alterations in rates of duty necessary to equalize foreign and domestic costs of production. The rate on barium oxide was increased and the plaintiff importing company paid the higher rate under protest and sued to recover, contesting the validity of the "flexible provision" as an unconstitutional delegation of legislative power. *Held*, on certiorari to Court of Customs Appeals, that the provision was valid. *J. W. Hampton & Co. v. United States*, U. S. Sup. Ct. Oct. T. 1927, No. 242.

The problem of the extent to which legislative power may be delegated to administrative officers and boards resolves itself into a consideration of the limits within which, in view of the increasing complexity of subject-matter, legislative bodies can practicably determine administrative duties without impairing the efficient execution of a statute and without imposing too detailed a task on themselves. *Trustees of Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693 (1908) (commission empowered to fix gas and electric rates). Some courts apply the narrow and conservative rule that the statute must be complete in all its terms and must leave nothing to the judgment of the administrative body. *State v. Fowler*, 114 So. 435 (Fla. 1927) (attempt to delegate power to make regulations for plumbing); *Snow v. Riggs*, 172 Ark. 835, 290 S. W. 591 (1927) (regulations by highway commission as to pedestrian traffic). Other courts, by designating such exercise of discretion the formulation of "substantive law," as distinguished from "quasi-legislative" rules, reach a similar result. *Compton v. Alabama Power Co.*, 115 So. 46 (Ala. 1927) (attempted regulation by Public Service Commission of contractual liability of public utilities). But where the courts recognize that the legislature has defined the general policy as far as is reasonably possible, and has left to the administrative body only the adaptation of such policy to varying local conditions or to peculiar exigencies with which the latter is better equipped to deal, the legislation is held valid. *McKinley v. United States*, 249 U. S. 397, 39 Sup. Ct. 324 (1919); *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480 (1911); *United States v. Chemical Foundation*, 272 U. S. 1, 47 Sup. Ct. 1 (1926) (disposition of enemy property); *People v. Hawkinson*, 324 Ill. 235, 155 N. E. 318 (1927) (qualification of medical schools); *State v. Foutch*, 295 S. W. 469 (Tenn. 1927) (granting pharmacy licenses in towns under 500). Thus, the efficient administration of public health laws necessitates a certain amount of local discretionary regulation. See *Brodbine v. Revere*, 182 Mass. 598, 600, 66 N. E. 607, 608

(1903); Tobey, *Public Health Law* (1926) 50, 99. Fish and game statutes are likewise peculiarly dependent on administrative discretion. *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15 (1922). So also in industrial fields where contact with local conditions is requisite. *State v. Lange Canning Co.*, 164 Wis. 228, 157 N. W. 777 (1916) (regulation of hours and working conditions of women employees); *Motter v. Derby Oil Co.*, 16 F. (2d) 717 (C. C. A. 8th, 1926) (determination of reasonable rate for pipe-line transportation); *St. Louis & F. Ry. v. United States*, 22 F. (2d) 980 (D. Mo. 1927) (enforcement of "recapture clause" by Interstate Commerce Commission). In the instant decision, the power granted to the President is not mandatory and leaves to his interpretation facts which are admittedly unsusceptible of accurate determination. (1927) 36 YALE LAW JOURNAL 573; (1927) 13 VA. L. REV. 206. As such, it would seem a recognition by the Court that Congress had dictated its intent as far as was feasible, and had left to the Executive details which could be more efficiently administered by him.

CONTRACTS—UNILATERAL MISTAKE—NEGLIGENCE—RESCISSION.—The plaintiff brought an action for breach against building contractors, who, on the same day the contract was signed, discovered their error in adding items of their estimate and notified the plaintiff. Judgment was for the defendants, the contract to be "cancelled." *Held*, on appeal, that the judgment be affirmed on the ground that it would be inequitable to permit the plaintiff, who "had good reason to believe that a substantial error had been made," to take advantage of the error while the contract was still executory, the contractors not being guilty of "culpable negligence." *Geremia v. Boyarsky*, 140 Atl. 749 (Conn. 1928).

It is usually held that a substantial unilateral mistake will not excuse performance and be ground for rescission if the mistake is negligent. *Steinmeyer v. Schroeppel*, 226 Ill. 9, 80 N. E. 564 (1907); *Grymes v. Sanders*, 93 U. S. 55 (1876); 3 Williston, *Contracts* (1920) § 1596. The courts differ as to what constitutes negligence. *Cf. St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N. W. 500 (1916) (on similar facts with the instant case and with *Steinmeyer v. Schroeppel, supra*, the court found no negligence). But the element of negligence is rarely decisive. 2 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) § 856. Theoretically, under the "subjective" theory of contracts negligence should not affect the question of the "meeting of minds." *Cf. St. Nicholas Church v. Kropp, supra;* see *Fehlberg v. Cosine*, 16 R. I. 162, 163, 13 Atl. 110, 111 (1888). And under a strictly "objective" theory negligence should also be immaterial, for mistake would be one of the "risks of the bargain." *Cf. Steinmeyer v. Schroeppel, supra; Brown v. Levy*, 29 Tex. Civ. App. 389, 69 S. W. 255 (1902); see Note (1927) 27 COL. L. REV. 60, 61. Conceivably, if the conduct of the other party is in all respects proper, the contractor's lack of care may be material. But cancellation being an equitable procedure the equities of the situation will actually often tend to override the question of the contractor's negligence. *Cf. Board of School Comm'rs v. Bender*, 36 Ind. App. 164, 72 N. E. 154 (1905) (contractor misinformed as to time for entering his bid, hence mistake due to hurry, not negligence); *Dzuris v. Pierce*, 216 Mass. 132, 103 N. E. 296 (1913) (mistake in contract to exchange land induced by illiteracy and misrepresentation by double agency); see *Moffett H. & C. Co. v. Rochester*, 91 Fed. 28, 32 (C. C. A. 2d, 1898), *rev'd* on other grounds, 178 U. S. 373, 20 Sup. Ct. 957 (1900) (relief is to be granted where the contract is "so oppressive as to be unconscionable"). Thus, if the other party is aware of the contractor's mistake and so acts in bad faith in demanding enforcement, the contract will be cancelled. *Tyra v. Cheney*, 129 Minn. 428, 152 N. W. 835 (1915); *R. O.*

Bromagin & Co. v. City of Bloomington, 234 Ill. 114, 84 N. E. 700 (1908). The same is true where, as in the instant case, the other party had "good reason to believe" an error had been made. *Crosby v. Andrews*, 61 Fla. 554, 55 So. 57 (1911). In the instant case the defendant's negligence should not be, and apparently is not, decisive because of the suspicion of bad faith on the part of the plaintiff.

CORPORATIONS—MOTION FOR APPOINTMENT OF APPRAISERS TO APPRAISE VALUE OF SHARES.—The petitioner owned shares in the defendant corporation, which were preferred as to dividends and capital distribution over the common shares. The defendant, with the necessary consent of two-thirds of its shareholders, filed a certificate with the state amending its articles of association so as to create two more classes of shares which were to be preferred over those of the petitioner both as to dividends and capital distribution. Section 38 (11) of the New York Stock Corporation Law provides that "if the certificate alters the preferential rights of any outstanding shares" any holder of such shares not voting in favor of such alteration may within a prescribed time object and demand an appraisal of his shares and payment of their value. Petitioner's motion for an appraisal was denied on the ground that the creation of new prior preference shares was not an alteration of the petitioner's "preferential rights" such as would entitle him to an appraisal under the statute; that is, his relative position with respect to existing shareholders was not changed, although it did operate to alter the "preferences" of his shares in the new capital structure of the corporation. *Held*, on appeal (three judges *dissenting* with an opinion), that the judgment be affirmed. *Dresser v. Donner Steel Co.*, 247 N. Y. 37 (1928).

In the absence of authority to the contrary in the original articles of association, a corporation was not privileged at common law to create shares with preferences over those already created, without the unanimous consent of all the shareholders. *Ernst v. Elmira Municipal Improvement Co.*, 24 Misc. 583, 54 N. Y. Supp. 116 (Sup. Ct. 1898) (action to enjoin creation of preferred shares by dissenting common shareholder); *Knoxville R. R. v. City of Knoxville*, 98 Tenn. 1, 37 S. W. 883 (1896) (bill by corporation to obtain specific performance of subscription contract. Subscriber to original common shares could not be forced to take subsequently authorized preferred shares); *cf. Rutland R. R. v. Thrall*, 35 Vt. 536 (1863) (action to recover unpaid assessments from subscriber for common shares; no defense that preferred shares were subsequently authorized, where purpose was to borrow and raise money). Such courts may, however, ascribe "laches" to the dissenting shareholders as a bar to their interference with the creation of the preferred shares. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159 (1879) (action to enjoin creation of preferred shares by dissenting common shareholder denied when plaintiff waited four years before suing, although the creation of the shares was open and notorious, and further where the rights of innocent third parties had intervened). Moreover, statutes have so modified this common law rule as to permit a majority or a certain percentage of the shareholders affected to authorize such preferred shares. *Hinckley v. Schwarzschild Co.*, 107 App. Div. 470, 95 N. Y. Supp. 357 (1st Dept. 1905), *aff'd* 193 N. Y. 599, 86 N. E. 1125 (1908) (consent of two thirds sufficient); *General Investment Co. v. American Hide & Leather Co.*, 98 N. J. Eq. 326, 129 Atl. 244 (1925) (same). But *cf. Born v. Beasley*, 145 Tenn. 64, 235 S. W. 62 (1921) (same). Such statutes included no provision for protecting the dissenting shareholders, although the changes usually resulted in some decrease in the value of his shares. *General Investment Co. v. American Hide & Leather*

Co., supra. But in only two jurisdictions are there statutes designed to protect a dissenting shareholder upon a change in the value or character of his "preferential rights" as a shareholder. N. Y. Cons. Laws (Cahill, 1923) c. 60, § 38 (11); see Ohio Corporation Act (1927) cited in Ballantine, *Corporations* (1927) 894. The instant case is the first and only decision interpreting such a statute. It is submitted that the sole purpose of this type of statute is to give protection to the dissenting shareholder, and that the court in the instant case defeated the purpose of the statute by engaging in technical refinements of the meanings of "preferences" and "preferential rights." See Note (1925) 11 CORN. L. Q. 78, 81.

COURTS—DISBARMENT—AMBULANCE CHASING.—The Bar Association of Brooklyn petitioned the court to investigate into the alleged prevalent practices of ambulance chasing and to exercise its disciplinary power to correct this abuse. *Held*, that the court has the power to direct a judicial inquiry into corrupt practices of attorneys though no specific charges are made and no individual accused, the investigation to proceed through private hearings. *In re Brooklyn Bar Ass'n.*, 223 App. Div. 149, 227 N. Y. Supp. 666 (2d Dept. 1928).

The power of the court to discipline attorneys is inherent and incidental to the discharge of its judicial functions. See *Wolfe's Disbarment*, 288 Pa. 331, 334 (1927); *In re Thatcher*, 80 Ohio St. 492, 653, 89 N. E. 39, 84 (1909). This power is not derived from the legislature. See *Ludens v. Harris*, 273 Ill. 413, 422, 112 N. E. 978, 982 (1916). And it has been held not to be subject to statutory limitation. See *In re Bailey*, 248 Pac. 29, 31 (Ariz. 1926). But see *Danford v. Superior Ct. of California*, 49 Cal. App. 303, 305, 193 Pac. 272, 273 (1920) (power to disbar an attorney is purely statutory). Some courts, however, will recognize reasonable regulations prescribed by the legislature, in so far as the legislation does not encroach on the rights of the court. *In re Olmstead*, 140 Atl. 634 (Pa. 1928); Green, *Courts' Power over Admission and Disbarment* (1925) 4 TEX. L. REV. 1; see *Higgins v. Burton*, 64 Utah 562, 564, 232 Pac. 914, 915 (1924); *In re Application for License to Practice Law*, 67 W. Va. 213, 218, 67 S. E. 597, 599 (1910). The exercise of this disciplinary power has been confined, almost wholly, to the trial or investigation of specific charges against individual attorneys. A general investigation by the court into certain prevailing practices of misconduct was first authorized in a recent Wisconsin case. *Rubin v. State*, 216 N. W. 513 (Wis. 1927). This was followed by a similar investigation order in New York. *In re Association of Bar of City of New York*, 227 N. Y. Supp. (App. Div. 1st Dep't 1928); (1928) 13 CORN. L. Q. 438. The only possible objections to these decisions are that they entail public hearings and a power to subpœna indiscriminately, with the resulting danger to the reputation of an innocent party summoned merely on suspicion and forced to testify. The instant case, in providing for private hearings, would appear to dispose of the objections and still provide adequate means for combating a prevalent evil.

EQUITY—TRADE SECRETS—DUTY OF NON-DISCLOSURE IMPOSED BY FIDUCIARY RELATION.—The plaintiff, executor, seeks to enjoin the defendant from using or divulging secret medical formulæ learned during employment with deceased. Judgment was for the plaintiff. *Held*, on appeal, that the judgment be affirmed on the ground that the originator of medical formulæ has such "right" in them as will enable him to prevent their use or disclosure by an ex-employee. *Glass v. Klottwitz*, 297 S. W. 573 (Tex. 1927).

Equity will generally protect as a trade secret any secret plan, process,

tool, mechanism or compound known only to its owner and those to whom it is necessary to confide it for its proper utilization. See *National Tube Co. v. Eastern Tube Co.*, 23 Ohio Cir. Ct. 468, 470 (1902). In any case an injunction will not issue in the absence of proper proof of the actual secrecy of the knowledge in question. *Cf. Newark Cleaning & Dye Works v. Gross*, 97 N. J. Eq. 406, 128 Atl. 789 (1925) (names and addresses of patrons known to all); *Peerless Roll Leaf Co. v. Lange*, 20 F. (2d) 801 (C. C. A. 3d, 1927); *Victor Chemical Works v. Iliff*, 299 Ill. 532, 132 N. E. 806 (1921) (information available in published literature). A limited publication, in absence of circumstances amounting to abandonment, does not dispense with the secret character of the knowledge. *Germo Mfg. Co. v. Coombs*, 240 S. W. 872 (Mo. 1922) (list, but not proportion of ingredients printed on the label); *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. 464, 60 Atl. 4. (1904) (blue prints sent with orders for convenience of buyers); *Radium Remedies Co. v. Weis*, 217 N. W. 339 (Minn. 1928) ("partial secrecy"). Courts have refused to recognize the names of laundry route patrons as a "trade secret." *El Dorado Laundry Co. v. Ford.*, 294 S. W. 393 (Ark. 1928). Names and addresses of such customers, however, have been protected as "good will" in which the owner has "property." *Colonial Laundries Inc. v. Henry.*, 138 Atl. 47 (R. I. 1927). Many courts grant relief in situations similar to that of the instant case on the basis of the "property right" theory. See (1924) 33 YALE LAW JOURNAL 439. More modern decisions, however, in the absence of an express contract, place the protection afforded on the basis of a contract implied in law from a confidential relationship between the parties. But there are diverse views as to what constitutes the necessary "confidential relationship." *Westervelt v. National Paper & Supply Co.*, 154 Ind. 673, 57 N. E. 552 (1900) (ex-employee); *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339 (1907) (ex-director); *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12 (1889) (repairman); *King v. Gannon*, 158 N. E. 346 (Mass. 1927) (no confidential relationship where machine shop owner copied designs of machine built in his shop by another). See (1927) 12 CORN. L. Q. 502. On either the "property right" or "implied contract" theory the courts are really protecting a party against bad faith and breach of confidence on the part of the defendant, and the absence of these elements will preclude recovery.

EVIDENCE—ADMISSIBILITY OF UNCOMMUNICATED REPUTATION OF DECEASED IN HOMICIDE CASES WHERE ISSUE IS SELF DEFENSE.—The defendant was on trial for murder. Under a plea of self-defense he offered the deceased's reputation for violence, though uncommunicated to him, for the purpose of showing that the deceased was the aggressor. *Held*, on appeal, that this evidence was properly excluded. *State v. Padula*, 138 Atl. 456 (Conn. 1927).

Communicated reputation is admissible on the issue of self defense to show that the defendant acted reasonably in defending himself. *Commonwealth v. Tircinski*, 189 Mass. 257, 75 N. E. 261 (1905); *State v. Wilson*, 41 Idaho 616, 243 Pac. 359 (1926). Communicated threats are admissible to show the defendant's belief that he was acting in self defense and also as evidence that the deceased was probably the aggressor. *State v. Smith*, 164 Mo. 567, 65 S. W. 270 (1901); *People v. Dunn*, 233 Mich. 185, 206 N. W. 568 (1925). Uncommunicated threats are admissible, not to show the defendant's state of mind, but that the deceased was probably the aggressor. *Campbell v. People*, 16 Ill. 17 (1854); *People v. Swigart*, 251 Pac. 343 (Cal. 1926); (1921) 34 HARV. L. REV. 675. These uncommunicated threats are not usually admitted as character evidence, but come in to show the deceased's intent in order to show the probability that he carried it

out. *Mutual Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909 (1892); 1 Wigmore, *Evidence* (2d ed. 1923) § 111. There seems to be some conflict as to the admissibility of uncommunicated reputation of the deceased to show that the defendant was the aggressor. *State v. McClausland*, 82 W. Va. 525, 96 S. E. 938 (1918) (admissible); *People v. Lamar*, 148 Cal. 164, 83 Pac. 993 (1906) (admissible); *Commonwealth v. Festo*, 251 Mass. 275, 146 N. E. 700 (1925) (inadmissible); 1 Wigmore, *Evidence* (2d ed. 1923) § 63. The court in the instant case held the evidence inadmissible because if a violent disposition is to be given probative value in determining who was the aggressor the prosecution should have the same opportunity to use this type of evidence as the defense; but since the prosecution cannot offer the defendant's reputation for violence until he has put his character in issue the defendant should not be permitted to show the deceased's violent disposition. *Cf. People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1 (1904). Though the court in the instant case undoubtedly reached a desirable result on the facts, the view expounded seems legalistically unsound. In many jurisdictions the prosecution can offer the deceased's reputation for peace and quiet when the issue of self defense is raised even though the defendant has not first introduced the deceased's reputation for violence. *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95 (1899). *Contra: State v. Reed*, 250 Mo. 379, 157 S. W. 316 (1913). The prosecution can always introduce the deceased's peaceable character if the defendant is allowed to introduce the deceased's reputation for violence. *Commonwealth v. Castellana*, 277 Pa. 117, 121 Atl. 50 (1923); (1923) 71 U. PA. L. REV. 394. As a practical matter, however, this evidence seems to be of too little value to merit the consideration of the court.

EVIDENCE—PEDIGREE AS EXCEPTION TO HEARSAY RULE—RELATIONSHIP OF DECLARANT.—A claimant, desiring to reach the estate of an intestate, offered as evidence the declarations of a first cousin, of the same family name, that claimant was the sister of deceased's father and so next of kin. The lower court refused to admit the evidence. *Held*, on appeal, that the judgment for the defendant be reversed since the relationship to the claimant having been made out, the declaration was admissible as an exception to the hearsay rule without independent proof that the declarant was related to the deceased's branch of the family. *Shea v. Hyde*, 140 Atl. 486 (Conn. 1928).

In the matters of pedigree the relationship of the declarant to the family must be established by extrinsic evidence. 3 Wigmore, *Evidence* (2d ed. 1923) § 1490. Ambiguity as to the meaning of the word "family" has given rise to two lines of cases. In one, independent evidence of declarant's relationship with both claimant's and deceased's branch of the family is necessary. *Aalholm v. People*, 211 N. Y. 406, 105 N. E. 647, L. R. A. 1915 D. 215, annotation. In the other, relationship of declarant with either branch is sufficient. *Sitler v. Gehr*, 105 Pa. 577 (1884); 3 Wigmore, *op. cit. supra*, § 1491. The strict rule applies particularly where the claimant seeks to establish relationship through affinity. *Aalholm v. People, supra*. But it sometimes prevails where relationship is through blood. *Pote v. Farren*, 129 Atl. 238 (Del. 1924) (declarations introduced to show declarant was a first cousin of deceased's family). *Contra: Overby v. Johnston*, 42 Tex. Civ. App. 348, 94 S. W. 131 (1906); see *Castor v. McDole*, 80 Ind. App. 556, 569, 137 N. E. 889, 893 (1923). On the other hand, where the claimant alleges that he is a blood relation of the ancestor, declarant's relationship with either claimant or family of deceased is sufficient. *In re Black's Estate*, 30 Wyo. 55, 216 Pac. 1059 (1923) (declarant the proven grandmother of claimant, court admitted declaration that deceased was her

brother). And even when the issue is one of pedigree through affinity, declarant's relationship need be shown independently to one branch of the family only. *In re McDade's Estate*, 95 Okla. 120, 218 Pac. 532 (1923); *In re Colbert's Estate*, 51 Mont. 455, 153 Pac. 1022 (1915) (under code requiring relationship in the family to be proven before admitting declaration). If the identity of the person spoken of in the declaration is in doubt, however, declarant's relationship with both branches must be shown. *Commonwealth v. Sweeny*, 283 Pa. 520, 129 Atl. 577 (1925). One writer states the general rule correctly that relationship with both branches need not be proven unless the claimant is seeking property. 4 Chamberlayne, *Evidence* (1911) § 2933; *cf. Conyer v. Burckhalter*, 275 S. W. 606 (Tex. Civ. App. 1925). It has been suggested that *Aalholm v. People*, *supra*, would shift the trend of American authority toward the stricter rule. (1914) 28 HARV. L. REV. 107. But this has not been the case. *In re Black's Estate*, *supra*; *Castor v. McDole*, *supra*; *In re McDade's Estate*, *supra*; *In re Colbert's Estate*, *supra*; L. R. A. 1915 D. 215, annotation. In some cases, the requirement of independent proof of the relationship of the declarant with the families of both the deceased and the claimant would seem to nullify all advantage of the pedigree rule, for under this restriction, the declaration would be mere surplusage. (1906) 20 HARV. L. REV. 142; 36 L. R. A. (N. S.) 530 (1912) annotation; *cf. Aalholm v. People*, *supra*. Moreover, since only slight evidence of relationship is required, identity in the family name of the declarant and the deceased, as in the instant case, is sufficient. *Sitler v. Gehr*, *supra*; *cf. Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780 (1886) (only slight outside evidence of dual relationship required). In view of the difficulty of proving pedigree in many cases it would seem best to admit relevant declarations of any person related to either claimant or deceased and allow the tribunal to attach such weight to it as the circumstances warrant.

EXECUTORS AND ADMINISTRATORS—RIGHT TO A REFUND OF OVERPAYMENT TO CREDITORS OR LEGATEES.—The plaintiff, receiver of an insolvent estate, filed a bill in equity alleging that the executrix had paid certain debts owed to the defendant under the mistaken belief that the estate was solvent, and sought to compel a refund of the excess over the *pro rata* share. The defendant demurred. *Held*, on appeal, that the order overruling the demurrer be affirmed. *Chestertown Bank of Maryland v. Perkins*, 140 Atl. 834 (Md. 1928).

The prevailing view supports a refund to the executor or administrator on facts similar to those of the instant case. *Wolf v. Beaird*, 123 Ill. 585, 15 N. E. 161 (1888); *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313 (1890); *Woodruff v. Claflin*, 198 N. Y. 470, 91 N. E. 1103 (1910); 3 Woerner, *The American Law of Administration* (3d ed. 1923) 1797. *Contra: Findlay v. Triggs Adm'r*, 83 Va. 539, 3 S. E. 142 (1887) (assets remaining insufficient to satisfy preferred creditors). There is less certainty where the executor or administrator attempts to recover a payment made to a legatee or distributee. The common practice is to require a refunding bond, in which case no question arises. Where a legacy or distributive share is voluntarily paid and the assets later prove insufficient to pay a debt of which there was no notice at the time of payment, it is usually held that the personal representative may recover enough to pay the debt. *Clifton v. Clifton*, 54 Fla. 535, 45 So. 458 (1907); *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210 (1903). It is sometimes said that the plaintiff must show that he acted with due care in ascertaining the claims before making payment. See Warren, *Problems in Probate and Administration* (1918) 32 HARV. L. REV. 315, 332-337. The better view would seem to be that such negligence should

not bar recovery unless the defendant is prejudiced thereby. *Mansfield v. Lynch, supra;* Warren, *op. cit. supra.* If the executor or administrator has wasted the assets, thus causing the deficiency, he cannot recover. See *Clark v. Truslow,* 146 N. Y. Supp. 750, 752, 161 App. Div. 675, 678 (2d Dept. 1914). Where the assets prove insufficient to pay unpaid legacies the prevailing view is that a legatee who has received only that to which he was entitled under the will is under no duty to refund any part. 3 Woerner, *op. cit. supra* 1902; Warren, *op. cit. supra* 332-337. But a residuary legatee may be under such a duty. *Clark v. Truslow, supra.* If because of a mistake of fact a legatee has received more than he is entitled to, the executor may recover the excess. *Stokes v. Goodykoontz,* 126 Ind. 535, 26 N. E. 391 (1891). In most jurisdictions there can be no recovery if payment is made under a mistake of law to one not entitled thereto. *Phillips v. McConica,* 59 Ohio St. 1, 51 N. E. 445 (1898); *Scott v. Ford,* 52 Or. 288, 97 Pac. 99 (1908). *Contra: Culbreath v. Culbreath,* 7 Ga. 54 (1849). See *Mansfield v. Lynch,* 59 Conn. 320, 326, 22 Atl. 313, 315 (1890). The same distinction is applied to payments to creditors. *Thorsen v. Hooper,* 57 Or. 75, 109 Pac. 388 (1910). The court in the instant case took jurisdiction on the ground that there was no remedy at law. But actions at law for money had and received have been allowed. *Morris v. Porter,* 87 Me. 510, 33 Atl. 15 (1895). It is well settled, however, that equity will take jurisdiction in these cases. *Von Lingen v. Field,* 141 Atl. 390 (Md. 1928); *Clifton v. Clifton, supra.* This may be due to historical reasons. The explanation suggested in the instant case is that the equity courts are better fitted to handle the problem.

HABEAS CORPUS—SCOPE—IMPRISONMENT FOR DEBT.—The petitioner was committed for contempt for his failure to obey a decree ordering the payment of an agreed sum of money. While an appeal was pending, he sued out a writ of habeas corpus, claiming that he was being held in violation of the Pennsylvania statute against imprisonment for debt. *Held,* that the facts constituted imprisonment for debt under the statute, and the petitioner should be released (one judge *dissenting* on the grounds that habeas corpus was not the proper remedy since the committing court had jurisdiction). *Commonwealth v. Heston,* 140 Atl. 533 (Pa. 1928).

The theory uniformly asserted is that habeas corpus provides a collateral attack and hence inquires only into the jurisdiction of the committing court. 1 Bailey, *Habeas Corpus* (1913) §§ 30, 71. Some courts, consequently, have limited themselves to the questions of whether the committing court had the parties properly before it, and had general power to act in that class of case. *Ex parte Kearney,* 7 Wheat. 38 (U. S. 1822); see *Williamson's Case,* 26 Pa. 9, 17, 29 (1855). This seems to be the view adopted by the dissenting judge in the instant case. *Supra* at 536. But most courts have permitted a broader scope of review. This has been accomplished, not by rejecting the theory that only jurisdiction could be reviewed, but by defining jurisdiction to include "power to render the particular judgment." 1 Thompson, *Trials* (1889) § 145; see *People v. Hackley,* 24 N. Y. 74, 78 (1861). It seems clear that under such a definition there can be no logical distinction between a "merely erroneous" decision and a judgment "void for want of jurisdiction," and that the courts in contempt cases are actually granting relief by habeas corpus wherever the error of the committing court seems sufficiently gross. See McLemore, *Review of Contempt Proceedings by Habeas Corpus* (1912) 74 CENT. L. J. 152. Thus a release was obtained by habeas corpus where the facts stated were held not to amount to a contempt. *Ex parte Hudgings,* 249 U. S. 378, 39 Sup. Ct. 337 (1919); *Ex parte Gordan,* 92 Cal. 478, 28 Pac. 489 (1891);

In re Dill, 32 Kan. 668 (1884); *Bushell's Case*, Vaughan 135 (1677). And where the order violated was held to have been improper. *Holman v. Mayor of Austin*, 34 Tex. 668 (1870); *Ex parte Rowland*, 104 U. S. 604 (1881). In cases raising the question of imprisonment for debt, while the more usual procedure has been to appeal, there is some authority for allowing the habeas corpus remedy. *Scott v. The Jailer*, 1 Grant. Cas. 237 (Pa. 1855); *Ex parte Gerrish*, 42 Tex. Cr. 114, 57 S. W. 1123 (1900); *In re Jaramillo*, 8 N. M. 598, 45 Pac. 1110 (1896); *Coughlin v. Ehlert*, 39 Mo. 285 (1866). The obvious advantage of the instant decision is the speedy relief which it affords to a prisoner entitled to an eventual discharge. This would seem to outweigh the procedural disadvantages resulting from allowing a collateral attack upon an adjudicated question.

INSURANCE—DESTRUCTION OF VESSEL BEFORE ISSUANCE OF POLICY.—The plaintiff chartered his vessel to another, who agreed to insure it. The charterer's agent in another city applied to the defendant for marine insurance covering the vessel "lost or not lost," and the next day, a few hours after the vessel was sunk, the policy was issued. The plaintiff, after being informed of the loss, made several unsuccessful efforts to get into communication with the charterer to ascertain from what company the insurance was obtained. In a suit on the policy, the court directed a verdict for the defendant. *Held*, on appeal, that the judgment be reversed, since even though the plaintiff had knowledge of the loss prior to the writing of the policy, if his agent negotiating the insurance had no such knowledge, and the plaintiff is guilty of no lack of diligence, the plaintiff can recover. *Pendergast v. The Globe & Rutgers Fire Insurance Co.*, 246 N. Y. 396 (1927).

It is the general rule of marine insurance that the applicant must disclose all material facts known to him, and those which, under all the circumstances of the case, ought to be known to him. *Ionides v. Pender*, L. R. 9 Q. B. 531 (1874); *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582 (1882); Vance, *Insurance* (1904) 251. And where the agent of the applicant has failed to use reasonable diligence to disclose any material fact to his principal, the policy will be void, though the principal has acted in good faith. *Proudfoot v. Montifiore*, L. R. 2 Q. B. 511 (1867); *Watson v. Delafield*, 2 Caines 223 (N. Y. 1804); *Gladstone v. King*, 1 M. & S. 35 (1813). But the agent must be under a duty to disclose such information to his principal in the ordinary course of business. *Blackburn, Low & Co. v. Vigors*, 12 App. Cas. 531 (1887). And the agency relation need not extend to the insurance itself to impute his knowledge of the loss to his principal. *Proudfoot v. Montifiore, supra; Fitzherbert v. Mather*, 1 Term. R. 12 (1785) (insured's shipping agent); *Gladstone v. King, supra* (master of insurer's vessel). *Contra: General Int. Ins. Co. v. Ruggles*, 12 Wheat. 408 (U. S. 1827) (master of insured's vessel). This rule does not require the insured to use all possible means, but only all reasonable means of ascertaining the condition of his property. *Neptune Ins. Co. v. Robinson*, 11 Gill. & J. 256 (Md. 1840). The same rule applies to the insured's agent. *Wake v. Attorney*, 4 Taunt. 493 (1812). It is generally held that the use of means available in the ordinary course of business constitutes reasonable diligence. *Proudfoot v. Montifiore, supra* (failure to use telegraph voided the policy); *Snow v. Mercantile Ins. Co.*, 61 N. Y. 160 (1874) (failure to use cable, when the cable was not in general use, did not void the policy). What constitutes reasonable diligence has been held to be a question of fact for the jury. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170 (U. S. 1828); *Green v. Mer. Ins. Co.*, 10 Pick. 402 (Mass. 1830). On facts similar to those in the instant case, the complaint of the plaintiff was held to have

been erroneously dismissed. *McLanahan v. Universal Ins. Co., supra.* The instant case qualifies the general rule to this extent, that the non-disclosure of a material fact, unknown to the insured's agent applying for insurance, does not avoid the policy issued, even though such fact is actually known to the insured, provided the insured has been guilty of no lack of diligence in communicating such information to his agent.

INSURANCE—SUBROGATION OF INSURER TO CLAIMS OF INSURED.—The defendant company was operating a water system under contract with the city by which it agreed to furnish a certain supply of water and other facilities for extinguishing fires. Certain premises were destroyed by fire. The insurance companies paid the loss. The owner of the premises, a taxpayer of the city, suing for the insurance companies, and the companies themselves brought action against the defendant, alleging that the loss was due to the defendant's failure to comply with the provisions of its contract with the city. *Held,* on appeal, that a demurrer to the petition was properly sustained. *Burford & Co. v. Glasgow Water Co.,* 2 S. W. (2d) 1027 (Ky. 1928).

It is well settled in Kentucky that an individual tax payer may recover in an action against the water company for fire loss due to breach of the company's contract. *Paducah Lumber Co. v. Paducah Water Supply Co.,* 89 Ky. 340, 12 S. W. 554 (1889); *Harlan Water Co. v. Carter,* 220 Ky. 493, 295 S. W. 426 (1927). But when an insurance company has paid part of such loss, the insured can recover only the remainder from the water company. *Georgetown Water Co. v. Neale,* 137 Ky. 197, 125 S. W. 293 (1910). In most jurisdictions the right of the citizen to recover either in contract or in tort is denied, unless the contract expressly imposes such liability upon the water company. *German Alliance Ins. Co. v. Home Water Supply Co.,* 226 U. S. 220, 33 Sup. Ct. 32 (1912); *H. R. Moch Co. v. Rensselaer Water Co.,* 247 N. Y. 160, 159 N. E. 896 (1928); *Prindle v. Sharon Water Co.,* 105 Conn. 151, 134 Atl. 807 (1926). This view is followed even in those states where the right of a donee-beneficiary to sue upon a contract intended for his benefit is generally recognized. The probable explanation is the fear of imposing an unreasonable burden upon the water companies. See *H. R. Moch Co. v. Rensselaer Water Co., supra* at 168, 159 N. E. at 898. Conceding that the defendant was responsible to the insured it is difficult to reconcile the instant case with the authorities. The general rule is that when an insurer pays to the insured the amount of the loss, it is subrogated, in a corresponding amount, to any right of action for the loss that the insured may have against third persons. *Castellain v. Preston,* 11 Q. B. D. 380 (1883); *Travellers' Ins. Co. v. Great Lakes Engineering Works Co.,* 184 Fed. 426 (C. C. A. 6th, 1911); 5 Joyce, *Insurance* (2d ed. 1918) 5580. As fire insurance is a contract of indemnity, the loss as between the contracting parties falls on the insurer, its responsibility being limited to the loss actually sustained. See *Castellain v. Preston, supra* at 386. Where the insured sues in his own name he recovers as trustee for the insurer. *United States v. American Tobacco Co.,* 166 U. S. 468, 17 Sup. Ct. 619 (1897). The right to subrogation has been upheld in one of the other jurisdictions adopting the view that the insured may sue the water company in a case identical with the present one. *Powell and Powell v. Wake Water Co.,* 171 N. C. 290, 88 S. E. 426 (1916). It is evident that the court in the instant case felt that to recognize the right to subrogation would be to impose an intolerable burden upon the water companies. Perhaps the most desirable method of avoiding this result would be to adopt the prevailing view denying the citizens' right against the water company.

INTERNATIONAL LAW—WAR—EFFECT ON ALIEN PROPERTY.—After the declaration of war but before sequestration legislation was passed, two German subjects transferred their certificates for shares of an American railroad to the plaintiffs, who were subjects and residents of the Netherlands. Seizure of these shares was subsequently effected on the books of the company under the Trading with the Enemy Act of Oct. 6, 1917, § 7 (b) [40 Stat. 411 (1917), U. S. Comp. Stat. (Supp. 1919) § 3115½ d.] which provided that transactions constituting "trade with the enemy" which had been illegal, remained so and were prohibited under penalty. Plaintiff's bill, seeking recognition as a shareholder, was dismissed on the ground that the transfer was ineffective as against the subsequent seizure. *Held*, on appeal, that the degree be affirmed. *Schrijver v. Sutherland*, 19 F. (2d) 688 (D. C. 1927) *cert.* denied, 48 Sup. Ct. 84 (1927).

That war does not, of itself, confer a power of sequestration of the enemies' property, but merely creates such a power in the legislature, is an established principle of international and American law. At one time this extended to the power of confiscation, though in modern times confiscation is deemed prohibited. *Brown v. United States*, 8 Cranch. 110 (U. S. 1814); *McVeigh v. Bank*, 26 Gratt. 188 (Va. 1875); *cf. Conrad v. Waples*, 96 U. S. 279, 284 (1878) (until a statute provides for sequestration or confiscation, a court cannot validly decree sequestration or confiscation of property on land. There is no automatic embargo). It would follow that the instant assignment could hardly be termed an "illegal transaction" since it occurred before the sequestration act, and therefore the statute could have no retroactive effect so as to render such assignment invalid. The adjudication that the transaction was within the Act as a "trading with the enemy" is also opposed to the settled usage of international and Anglo-American law that this phrase contemplates only the trading across the border of belligerent countries. See *Kershaw v. Kelsey*, 100 Mass. 561, 573 (1868). The penal prohibition against "trading with the enemy" was properly directed only to American citizens or persons in the United States. It was not directed to foreigners abroad, and it did not purport to prohibit trading by the enemy before October 6, 1917. When it is further considered that, by the treaty between Prussia and the United States of 1799, provision is made for allowing merchants of either country nine months to collect debts, settle their affairs, and withdraw their property in time of war [2 Malloy, *Treaties* (1910) 1492], and that by proclamation of February 1917, the President assured the security of German property, it would appear that the instant decision is of questionable soundness.

LANDLORD AND TENANT—STATUTORY CHANGE IN POSSIBLE USE OF PREMISES—SURRENDER.—The plaintiff leased to the defendant a three-story non-fireproof building to be used incidentally as an automobile service station. The legislature subsequently passed an act providing that no non-fireproof building used as a service station should be erected to a greater height than two stories. The building was destroyed by fire. The lease provided that in case of total destruction of the building no rent should be collected until the premises were completely rebuilt. The plaintiff offered to erect either a two or three story non-fireproof building. The defendant replied that it would pay full rent only for a three story fireproof building. A declaratory judgment was entered to the effect that the contract was rescinded by operation of law. *Held*, on appeal, that the judgment be affirmed on the ground that the defendant's refusal to accept the plaintiff's proposition, together with the plaintiff's acquiescence in the judgment of the lower court, amounted to a surrender by operation of law. *Girard Trust Co. v. Tremblay Motor Co.*, 140 Atl. 506 (Pa. 1928).

In the absence of express agreement a lessor does not warrant that the leased premises will remain suitable for the purposes for which they are leased. *Federal Metal Bed Co. v. Alpha Sign Co.*, 289 Pa. 175, 137 Atl. 189 (1927); *Widmar v. Healey*, 247 N. Y. 94, 159 N. E. 874 (1928). When the principal use for which premises are leased is prohibited by statute, the duty to pay the full rent is not terminated if any beneficial use remains. *Lawrence v. White*, 131 Ga. 840, 63 S. E. 631 (1909) (premises leased primarily for the sale of liquor); *Proprietors Realty Co. v. Wohltmann*, 95 N. J. L. 303, 112 Atl. 410 (1921) (same); *Imbeschied v. Lerner*, 241 Mass. 199, 135 N. E. 219 (1922) (same). *Contra: The Stratford Inc. v. Seattle Brewing and Malting Co.*, 94 Wash. 125, 162 Pac. 31 (1916) (premises leased for saloon and restaurant purposes). If the statute prohibits every possible use, the duty to pay rent is extinguished. *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 So. 876 (1912). Since in the instant case the use prohibited was at least no more important than the uses still available, the conclusion that the lessee would be under a duty to pay full rent for a building similar to the one destroyed is in accord with the authorities. Since the plaintiff had indicated his willingness to treat the lease as terminated and since the defendant did not wish to continue the relation on the only terms possible under the view taken by the court, a desirable result seems to have been attained in declaring the lease at an end. The theory of surrender by operation of law most strongly supported is that it is the nature of an estoppel, the parties having voluntarily placed themselves in a position inconsistent with the continuance of the term. 2 Tiffany, *Landlord and Tenant* (1912) 1322–1323; see *Kull v. Mastbaum and Fleisher*, 269 Pa. 202, 205, 112 Atl. 631, 632 (1921). Another theory is that the surrender is found from acts manifesting a mutual intent to terminate the relation. See *Banks v. Berliner*, 95 N. J. L. 267, 270, 113 Atl. 321, 322 (1921); *Chambers Co. v. Trask*, 158 N. E. 786, 788 (Mass. 1927). It may be questioned whether the facts of the instant case satisfy the technical requirements of either theory, but the similarity between this case and other well recognized examples of surrender by operation of law would seem sufficiently clear to justify the conclusion.

PERPETUITIES—SUBSTITUTIONARY GIFT OVER AFTER A LIMITATION UPON A LIFE ESTATE TO GRANDCHILDREN "THEN LIVING."—By the third clause of his will the testator devised the use of certain real estate to his daughter for life "and at her death [the use] unto my grandchildren [unnamed] *then living*—and to the survivors of them." Upon reaching the age of thirty, each was to receive half of his respective share of the principal and at the age of fifty the other half, provided: "If any of my said grandchildren die before said distribution leaving children, such children will take the share that would have been distributed to their parents." Clause ten provided that the residue of the estate "shall be paid as above stated." The testator was survived by the daughter and three grandchildren. In a suit to construe the will *held*, that upon the testator's death the remainder vested in the grandchildren as a class, open to admit after-born grandchildren until the period of distribution; and although the gift to children of an after-born grandchild was void as violating the rule against perpetuities, the rest of the will was valid. *Shepard v. Union and New Haven Trust Co.*, 106 Conn. 627, 138 Atl. 809 (1927).

In absence of a contrary intention the members of a class taking a remainder limited upon a life estate are ascertained, and the estate vests upon the death of the testator. *Tipton v. Tipton*, 1 S. W. (2d) 485 (Tex. Civ. App. 1928); *Linscott v. Trowbridge*, 224 Mass. 108, 112 N. E. 956

(1916). But when the limitation upon the life estate is to persons "then living" the contrary intention is manifested, members of the class are not ascertained, and the estate does not vest until the death of the life tenant. *Compton v. Rixey*, 124 Va. 548, 98 S. E. 651 (1919); *Walker v. Wilmans*, 3 S. W. (2d) 303 (Ark. 1928); *cf. White v. Smith*, 87 Conn. 663, 672, 89 Atl. 272, 275 (1914). *Contra: Harrison v. Harrison*, 213 Ala. 418, 105 So. 179 (1925), criticised in (1925) 24 MICH. L. REV. 399. Except that if the members of the class are named it vests in them upon the death of the testator. *Bender v. Bender*, 225 Pa. 434, 74 Atl. 246 (1909). In the instant case the intention is confirmed by an express provision that the grandchildren's income from the estate shall not begin until the death of their mother. The Connecticut court has been extreme in holding remainders to be vested. *Close v. Benham*, 97 Conn. 102, 115 Atl. 626 (1921); *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585 (1893); criticized in Gray, *Rule Against Perpetuities* (3d ed. 1915) § 205 b. This has probably been due to the insidious effect of the use of the term "vested contingent remainders." *Johnson v. Edmond*, 65 Conn. 492, 33 Atl. 503 (1895); *Bartram v. Powell*, 88 Conn. 86, 89 Atl. 885 (1914); Gray, *op. cit. supra* § 118; Cleaveland *et al., Probate Law and Practice in Conn.* (1915) § 436. *Farnam v. Farnum*, 53 Conn. 261, 2 Atl. 325 (1885), cited in the instant case for the proposition that the remainder to the grandchildren vested on the death of the testator, has been disapproved. *Farnum v. Farnum*, 83 Conn. 369, 77 Atl. 70 (1910). If the remainder in the instant case is considered to be contingent, it might easily happen that it would vest at the death of the life tenant only in grandchildren born after the death of the testator. *Jee v. Audley*, 1 Cox 324 (1787); *Ward v. Van der Loeff*, 131 L. T. R. 292 (H. L. 1924); Gray, *op. cit. supra* § 215. The conditional limitation to the issue of such grandchildren is manifestly too remote and the entire substitutionary gift over apparently should fail. *Jee v. Audly, supra; Ward v. Van der Loeff, supra; cf. Loud v. St. Louis Union Trust Co.*, 298 Mo. 148, 249 S. W. 629 (1923). Had the court so declared in this case, the fee in the grandchildren would have become absolute upon the death of the life tenant. *White v. Smith, Supra;* Note (1925) 38 HARV. L. REV. 379. The will then would still have been valid, and the possible future dilemma of overruling this case, or further confusing of the law on this subject would have been avoided.

PLEADING—MISJOINDER—MOTION TO REQUIRE ELECTION.—The plaintiff bought a storage battery from a middle man and sustained injury due to defective manufacture. In an action against the manufacturer for breach of warranty and negligence, the defendant moved to compel plaintiff to elect between the two causes of action and serve an amended complaint. The plaintiff appeals by permission from an order of the Appellate Division, reversing an order of the Special Term denying the motion. *Held*, that the cause for breach of warranty could not be sustained. And since, therefore, there were not two causes stated between which election could be required; and since no question of misjoinder essential to the decision had arisen, the appeal should be dismissed. *Turner v. Edison Storage Battery Co.*, (N. Y. Ct. App., May 1, 1928).

A consensus of the cases would seem to indicate substantial unanimity on the proposition that an ultimate consumer, purchasing through a middleman, may not hold the manufacturer on an implied warranty. *Welshausen v. Charles Parker Co.*, 83 Conn. 231, 76 Atl. 271 (1910); 1 Williston, *Sales* (2d ed. 1924) § 244. An exception has developed in some jurisdictions as to inherently dangerous commodities, such as defective foodstuffs. *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927) (glass in

soda); *Davis v. Van Camp*, 189 Iowa 775, 176 N. W. 382 (1920) (can of beans). *Contra: Birmingham Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *cf.* 17 A. L. R. 672 (1922) annotation. As pointed out in the principal case, it is well settled in New York that not even defective foodstuffs will support such an action. *Chysky v. Drake*, 235 N. Y. 468, 139 N. E. 576 (1923) (based on the absence of privity between consumer and producer). With this in view, the court stated that it would not require an election between "cause of action" (in negligence) and "no cause of action" (in warranty). But it has been repeatedly declared by the Court of Appeals that a mere statement of inconsistent alleged causes is sufficient to bring a complaint within the misjoinder provisions of the Code. See *Jacobus v. Colgate*, 217 N. Y. 235, 247, 111 N. E. 837, 841 (1916); *Brock v. Poor*, 216 N. Y. 387, 394, 111 N. E. 229, 232 (1915); *Witherbee v. Bowles*, 201 N. Y. 427, 433, 95 N. E. 27, 29 (1911). The instant dictum would seem to limit this rule, refusing to extend it where "no cause of action" is stated. *Cf. Sullivan v. R. R.*, 61 How. Prac. 490 (N. Y. 1881) (accord). Several other jurisdictions require that the causes attacked for misjoinder be completely alleged in order that the defendant's objection may prevail. *Barnett v. Ground*, 304 Mo. 593, 263 S. W. 836 (1924); *White v. White*, 132 Wis. 121, 111 N. W. 1116 (1907); *Flint v. Hubbard*, 16 Colo. App. 464, 66 Pac. 446 (1901). But *cf. Penter v. Straight*, 1 Wash. 365, 25 Pac. 469 (1890) (demurrer will lie for misjoinder even though the second cause is insufficiently stated). This would seem to be the more desirable handling of matters which do not go to the merits of the case. It has been suggested that the most expedient course would be to disregard the defective cause as surplusage. See Clark, *Joinder and Splitting of Causes of Action* (1927) 25 MICH. L. REV. 393, 416. The holding of the court in dismissing the appeal, while seemingly contrary to the tenor of the decision, is explainable by the practice of the court in restricting itself to a consideration of the question certified to it for determination.

PLEADING AND PRACTICE—SUNDAY TRIAL—WAIVER OF IRREGULARITY.—At the express request of the parties and pursuant to a written waiver of any legal irregularity, a hearing before a referee was held on Sunday. From a decision in favor of the defendant, confirmed by the lower court, plaintiff appeals on the ground that the hearing was void under § 5 of Judiciary Law [N. Y. Cons. Laws (Cahill, 1923) c. 31, § 5]. *Held*, that the proceeding was void as involving a matter of public policy which could not be waived. *Ruderfer v. Kuflik*, 222 App. Div. 662, 227 N. Y. Supp. 343 (1st Dept. 1928).

Where a matter of "public policy" is concerned it is generally held that irregularities of a trial may not be waived. *Freeman v. United States*, 227 Fed. 732 (C. C. A. 2d, 1915) (waiver of jury in trial for felony); *Wilson v. State*, 153 Tenn. 206, 281 S. W. 151 (1926) (waiver of judge's disqualification). Equally well established is the doctrine that a rule of law, statute, or constitutional provision enacted exclusively for a party's personal benefit or protection may be waived by him. *State v. Woodling*, 53 Minn. 142, 54 N. W. 1068 (1893) (waiver of jury in trial for misdemeanor); *Tari v. State*, 159 N. E. 594 (Ohio, 1927) (waiver of judge's disqualification allowed). Under the New York law in question, a judgment rendered on Sunday on a plea of guilty has been held void, based on the common law rule prohibiting "judicial" acts on Sunday, as distinguished from purely "ministerial" acts. *People v. Ramsey*, 128 Misc. 39, 217 N. Y. Supp. 799 (Sup. Ct. 1926); (1927) 36 YALE LAW JOURNAL 421. *Contra: People v. Kaplan*, 217 App. Div. 252, 217 N. Y. Supp. 763 (4th Dept. 1926). But in many jurisdictions the scope of "ministerial" acts has been extended under the exception

permitting acts of "necessity and mercy." *De Orozco v. United States*, 237 Fed. 1008 (C. C. A. 5th, 1916) (fixing amount of bail bond); *Adams v. Cook*, 91 Vt. 281, 100 Atl. 42 (1917) (return and receipt of verdict after Saturday midnight). In jurisdictions where the inviolability of Sunday is more rigidly observed, the tendency is toward a strict interpretation of the Sunday Laws prohibiting the exercise of all judicial functions. *Weldon v. Colquitt*, 62 Ga. 449 (1879) (Sunday trial on plea of guilty); *Harrison v. Bay Shore Development Co.*, 111 So. 128 (Fla. 1926) (appeal made returnable on Sunday). This view has been predicated on the preservation of public health by enforcing Sunday as a day of rest. *Moss v. State*, 131 Tenn. 94, 173 S. W. 859 (1915) (charging jury on Sunday). The same justification has been postulated for the contrary tendency in extending the functions of courts on Sunday, to deal with breaches of the peace. *People v. Kramer*, 225 Mich. 35, 195 N. W. 802 (1923) (issuing search warrants). To allow a party, at whose request and for whose benefit the irregularity of Sunday trial was permitted, subsequently to challenge the legality of such proceedings, has been denounced as a "palpable miscarriage of justice and a mockery of judicial procedure." *State v. Foss*, 158 La. 471, 104 So. 211 (1925) (trial on Sunday). In view of the contrasting trends of judicial decisions toward strict or liberal interpretations of the common law rule, the distinction between ministerial and judicial acts has become practically indefinable and public policy a questionable justification. In the instant decision the tactics of the plaintiff in raising an objection to the proceedings, after an express waiver and an unfavorable verdict, are certainly more at variance with public policy than is the technical irregularity of a judicial hearing on Sunday.

TRUSTS—EXECUTION ON EQUITABLE ESTATE OF CESTUI QUE TRUST.—In accordance with the provisions of a will, certain lands were held in trust for the testator's ten children, to be equally divided among them when the youngest attained his majority. An execution was levied on the undivided one-tenth share of a daughter, *A*. In a suit for a declaratory judgment and an injunction restraining the sheriff from further proceedings, a demurrer to the plaintiff's petition was sustained. *Held*, on appeal, that the judgment be affirmed, on the ground that since *A* would probably live until her brother became of age (three and a half years later), her equitable estate was subject to execution under Kan. Rev. Stat. Ann. (1923) 77-201. *Thompson v. Zurich State Bank*, 260 Pac. 658 (Kan. 1927).

The equitable estate of a cestui que trust was not subject to execution at common law. 2 Freeman, *Executions* (3d ed. 1900) § 187. This rule is still followed in some states. *Peoples' Bank v. Deweese*, 144 Ky. 172, 137 S. W. 850 (1911); *Rouse v. Rouse*, 167 N. C. 208, 83 S. E. 305 (1914); *Feldman v. Preston*, 194 Mich. 352, 160 N. W. 655 (1916). In these states the remedy is a creditor's bill in equity. *Feldman v. Preston, supra; People's Bank v. Deweese, supra.* Many states have enacted the provision of § 10 of the Statute of Frauds [29 Car. II, c. 3 (1677)] by which passive trusts were deprived of this exemption. Ala. Civ. Code (1923) § 7806; N. Y. C. P. A. (1924) § 709. Some courts subject the estate of the cestui of an active trust to execution by interpreting statutes providing that "all property real and personal of the judgment debtor, not exempt by law, shall be liable to execution" as referring to equitable as well as legal interests. *Fish v. Fowlie*, 58 Cal. 373 (1881); *Gordon v. Hillman*, 107 Wash. 490, 182 Pac. 574 (1919). Several jurisdictions, including that of the instant case have expressly provided for the same result by statute. Neb. Code Civ. Proc. (1927) § 2455; 2 Mills Colo. Ann. Stat. (Courtright, 1927) § 4163; Bogert, *Trusts* (1921) 442, n. 28. In states where spendthrift trusts are

upheld, the enforced intention of the settlor, rather than any procedural difficulty, precludes a levy. Bogert, *op. cit. supra* at 180-187; (1926) 35 YALE LAW JOURNAL 767. Moreover, an interest which is so indeterminate, indefinite, or contingent, that it is incapable of being sold with fairness to both creditor and debtor may not usually be thus levied upon. *Smith v. Gilbert*, 71 Conn. 149, 41 Atl. 284 (1898) (son's interest contingent on surviving his mother held too indefinite); *Safe Deposit Co. v. Independent Brewing Ass'n.*, 127 Md. 463, 96 Atl. 617 (1916) (wife's interest contingent on her surviving her husband held too uncertain). But the decision in the instant case is to be approved since it seems desirable that all the assets of a debtor should be subject to his debts. With the economic value now attached to expectancies, interests which are only slightly contingent and problematical, as in the instant case, are properly made subject to execution.

UNFAIR COMPETITION—PRIVILEGE OF MANUFACTURER TO REFUSE TO SELL TO DEALER.—The plaintiff's deceased husband organized a sales corporation for the exclusive marketing of the defendant's product. The defendant Victor Talking Machine Company urged him to buy up all the shares of this corporation, threatening to discontinue business if he refused, but indicating that it would continue to furnish its product if he complied. After the deceased had secured the shares, the plaintiff as sole legatee and executrix brought an action in tort for damages, alleging that the defendant, attempting to acquire the name and good will of her business, which she refused to sell, had ceased furnishing its product and thereby rendered the shares practically worthless. A demurrer to the complaint was sustained. *Held*, on appeal, that the judgment be affirmed on the ground that the corporation and not the plaintiff was the proper party and that furthermore, the defendant's conduct was in nowise tortious. *Green v. Victor Talking Machine Co.*, 24 F. (2d) 378 (C. C. A. 2d, 1928).

The court disposed of the problem on the ground of capacity, but the dictum that a "mere refusal to sell" is not tortious suggests that the defendant corporation, after encouraging a retail concern to market its goods exclusively, may destroy it by withdrawing its business on the plaintiff's refusal to sell out. But *cf. Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d, 1915) (same rule applied to achieve contrary result, *i. e.*, to protect *manufacturer* from possible absorption by *retailer*). This would be particularly harsh under modern methods of sale, whereby a demand for a specific brand is created. In such a situation, the retailer may be unable to obtain a contract, in view of the relative strength of the parties. The courts generally refuse to disregard the ethical element in business competition and the tendency is to grant relief. *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909) (banker with sole purpose of ruining a barber set up a competing shop with cut rates. To designate this as "competition" was considered a "perversion of terms"); *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N. W. 754 (1927) (court weighed the economic status of the parties and insisted on "as high a standard of business morality as prevails among reputable business men"); *Dunshee v. Standard Oil*, 152 Iowa 618, 132 N. W. 371 (1911) (defendant ruined retailer by "simulating" competition. "Competition must be considered in the light of reasonable conduct under all the circumstances"); *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737 (1900); *London Guarantee and Accident Co. v. Horn*, 206 Ill. 493, 69 N. E. 526 (1903); *Schonwald v. Ragains*, 32 Okla. 223, 122 Pac. 203 (1912); *Hughes v. Samuels Brothers*, 179 Iowa 1077, 159 N. W. 589 (1916); *cf. Passaic Print Works v. Ely*, 105 Fed. 163 (C. C. A. 8th, 1900) (Sanborn, J. *dissenting*); *Westminster Laundry Co. v. Hesse Envelope Co.*, 174

Mo. App. 238 (1913); *Nat'l Ass'n Window Glass M'frs. v. United States*, 263 U. S. 403, 44 Sup. Ct. 148 (1923). The court distinguished the instant case in that there was no "affirmative conduct" or "interference with the expectancy of dealing with third parties," but it is submitted that the decisions are based on a determination of the reasonableness of the competition. Possibly there were undisclosed factors, such as incapability of the plaintiff or an attempt to extort an unreasonable price, which would weaken her case. But it should not follow that large manufacturers may secure the marketing facilities which they have induced others to develop, without paying therefor. *Cf.* (1928) 70 N. Y. L. J. 952.